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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

CHASOM BROWN, *et al.*, individually and
on behalf of all similarly situated,

Plaintiffs,

v.

GOOGLE LLC,

Defendant.

Case No. 4:20-cv-03664-YGR-SVK

**GOOGLE LLC'S REPLY IN SUPPORT
OF ITS MOTION TO STRIKE EXHIBIT
A TO MAO DECLARATION IN
SUPPORT OF PLAINTIFFS'
ADMINISTRATIVE MOTION FOR
RELIEF (DKT. 672-2)**

Judge: Hon. Susan van Keulen

1 **I. INTRODUCTION**

2 Google moved to strike Plaintiffs’ Exhibit A to the Declaration of Mark Mao in Support of
 3 Plaintiffs’ Administrative Motion for Relief (“Exhibit A”) because it impermissibly added nearly
 4 six pages of argument to Plaintiffs’ motion, in direct violation of Civil Local Rules 7-11(a) (limiting
 5 administrative motions to five pages of argument) and 7-5(b) (providing that supporting declarations
 6 “may contain only facts . . . and must avoid conclusions and argument). Plaintiffs’ opposition
 7 (“Opposition”) all but admits as much, acknowledging both that Exhibit A does more than “provide
 8 black-and-white factual information” and that the exhibit’s express purpose is to contrast Plaintiffs’
 9 characterization of Google’s documents with allegedly “contradictory positions taken by Google.”
 10 Dkt. 721-1 at 2. This is unquestionably the stuff of argument, particularly on a motion that seeks
 11 preclusion sanctions because withheld documents allegedly “include admissions that concern
 12 contested issues in this case.” Dkt. 671-2 at 1.

13 Unsatisfied with even their already inflated argument, Plaintiffs remarkably use their
 14 Opposition to add *even more argument* and *two additional exhibits* in support of their original
 15 administrative motion—further violating this district’s rules and making a mockery of the limits
 16 they impose. *See* Dkt. 721-1 at 4-7. In addition to Exhibit A, the Court should strike Section II(B)
 17 of Plaintiffs’ Opposition and both Opposition exhibits.

18 **II. ARGUMENT**

19 **A. Plaintiffs’ Opposition Confirms Exhibit A Constitutes Impermissible Argument**

20 Plaintiffs’ Opposition readily acknowledges that Exhibit A consists of more than “black-
 21 and-white factual information.” *See* Dkt. 671-2 at 2. They further admit (as they must) that the entire
 22 purpose of Exhibit A’s “Relevance” column is to provide so-called “context by identifying quotes
 23 with contradictory positions taken by Google [and] its experts.” *Id.* Exhibit A is thus not limited to
 24 “only facts” as the Local Rules require. Rather, it purports to contrast Plaintiffs’ own out-of-context
 25 characterizations of Google’s documents (in the “Description” column) with their own
 26 characterizations of Google’s litigation positions (in the “Relevance” column). In doing so, it plainly
 27 provides further argument on the core basis of Plaintiffs’ motion: that previously withheld
 28 documents allegedly “include admissions that concern contested issues in this case.” Dkt. 671-2.

Moreover, the entirety of Exhibit A—save for raw exhibit numbers, Bates numbers, and document authors—is replete with argumentative emphasis and commentary. *See* Dkt. 693 at 3. No fewer than 11 of 15 entries contain a version of the phrase, “This document supports Plaintiffs’ claim and undermines Google’s defenses.” *See* Dkt. 671-3 at 1–6; *see also, e.g., id.* at 3 (“A Google employee seemingly spearheading press-related communications following the filing of this lawsuit reveals that even *she is unaware that Google stores private browsing information . . .*” (emphasis in original)); *id.* at 4 (“This document . . . demonstrat[es] Google’s awareness that its disclosures are poor.”). Plaintiffs’ violations of Rules 7-11(a) and 7-5(b) are all the more glaring because, as Google explained in its opening brief, Exhibit A advances portions of their argument that Plaintiffs do not address, or otherwise gloss over, in their brief. *See* Dkt. 693 at 3.

Plaintiffs’ half-hearted attempts to distinguish pertinent authority only confirm that the Court should strike Exhibit A. Plaintiffs note that in *Page v. Children’s Council*, the court struck portions from a declaration that “repeat[ed] portions of the Plaintiff’s memo,” and advertise that “[t]here is no such repetition here.” Dkt. 721-1 at 3 (citing *Page v. Children’s Council*, 2006 WL 2595946, at *5 (N.D. Cal. Sept. 11, 2006)). Exactly. Plaintiffs use Exhibit A not just to replicate the arguments in their court-sanctioned five-page brief, but to augment them substantially, flouting the Court’s rules and more than doubling the space permitted for making their case.

Plaintiffs also brazenly mischaracterize *Brae Asset Funding*, pretending that it struck declarations merely because they referred “to exhibits that were never filed.” Dkt. 721-1 at 3 (citing *Brae Asset Funding, L.P. v. Applied Fin., LLC*, 2006 WL 2355474, at *5 (N.D. Cal. Aug. 14, 2006)). But the court in that case also held that the struck declarations violated Rule 7-5(b) because, just like Exhibit A, they were “full of legal argument and conclusions.” *Brae Asset Funding*, 2006 WL 2355474, at *5. Plaintiffs’ reading of *Percelle v. Pearson* is equally misleading. The court in *Percelle* struck substantial portions of one declaration “as being conclusory, stating legal arguments, and not stating any factual basis or personal knowledge for the conclusions and purported facts,” and portions of another for inaccurately “purport[ing] to summarize deposition transcripts and exhibits.” *Percelle v. Pearson*, 2015 WL 5736399, at *3 (N.D. Cal. Oct. 1, 2015). Exhibit A shares both of these deficiencies. Plaintiffs protest that the summaries the court struck in *Percelle* proved

1 incorrect whereas theirs “quote[] directly from documents that Google produced.” Dkt. 721-1 at 3–
 2 4. But as Google has already explained, Plaintiffs’ summaries (a combination of pure attorney
 3 commentary and cherry-picked quotations loaded with emphasis) are nothing but “self-serving
 4 conclusions as to what the discovery record purportedly shows.” Dkt. 693 at 5.

5 Unable to escape the flaws in their argument, Plaintiffs ask the Court not to strike Exhibit A
 6 even if it violates the Local Rules. Dkt. 721-1 at 4. The Court should reject that last-ditch request.
 7 Plaintiffs made a strategic choice to couch their request for preclusion sanctions as one for
 8 “administrative relief” under Local Rule 7-11, likely in an attempt to brief the issue faster, afford
 9 Google less time to respond, and save itself the effort of seeking leave to file yet another motion for
 10 sanctions. *See* Dkt. 692 at 2. They should be held to that strategic choice, and not permitted to
 11 prejudice Google further by continually augmenting their already improper sanctions motion.

12 **B. Plaintiffs Further Abuse the Rules by Using their Opposition as Yet Another Brief in**
 13 **Support of their Administrative Motion Seeking Sanctions**

14 Plaintiffs compound *the same misconduct that necessitated Google’s motion to strike* by
 15 dedicating the remainder of their Opposition to repeating and expanding on the arguments in their
 16 original administrative motion. Granting themselves the reply brief they consciously forwent when
 17 they styled their substantive sanctions motion as one for “administrative relief,” Plaintiffs dedicate
 18 more than two pages and two additional exhibits to arguing that Google wrongfully withheld certain
 19 documents and prejudiced Plaintiffs. *See* Dkt. 721-1 at 4-7. Equity counsels that they should not be
 20 rewarded for this brash conduct.

21 Google contests Plaintiffs’ belated claims of misconduct—which are meritless for the same
 22 reasons Google provided in its opposition (Dkt. 692)—but the Court should not consider them at
 23 all. If Plaintiffs wanted the Court to examine these arguments and exhibits, they should have
 24 included them with their initial motion. The Court should strike the arguments and evidence in
 25 support of Plaintiffs’ administrative motion for sanctions in their Opposition (at Section II(B) and
 26 Exhibits 1–2) for the same reasons that it should strike Exhibit A to the original Mao Declaration.

1 **III. CONCLUSION**

2 For the foregoing reasons and for the reasons in Google's opening brief, Exhibit A to the
3 Mao Declaration, Section II(B) of Plaintiffs' Opposition, and Exhibits 1 and 2 to that Opposition
4 should be stricken from the record.

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